

# Law Office of Jack Silver

P.O. Box 5469

Santa Rosa, California 95402

Phone 707-528-8175

Fax 707-528-8675

lhm28843@sbcglobal.net



## ***Via Certified Mailing - Return Receipt***

January 25, 2013

Bryan Lowe  
Owner and Operator  
British Marine & Industrial  
11 Embarcadero Cove  
Oakland, CA 94606

### **Re: Notice of Violations and Intent to File Suit Under the Federal Water Pollution Control Act ("Clean Water Act")**

Dear Owner, Operator and/or Site Manager:

#### **NOTICE**

This Notice is provided on behalf of Northern California River Watch ("River Watch") in regard to violations of the Clean Water Act ("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the British Marine & Industrial marine repair and maintenance facility located at 9 Embarcadero Cove in Oakland. Notice is being sent to you as the as the responsible owner, operator or manager of this property and facility. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit and unlawful discharge of pollutants from the British Marine & Industrial site into the Brooklyn Basin and lower San Francisco Bay.

CWA § 505(b) requires a citizen to give notice of the intent to file suit 60 days prior to the initiation of a civil action under Section 505(a) of the Act. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in which the violations occur.

As required by the CWA, this Notice provides notice of the violations that have occurred, and continue to occur at the British Marine & Industrial facility. Consequently, British Marine & Industrial (the "Discharger") is placed on formal notice by River Watch

that after the expiration of 60 days from the date of this Notice, River Watch will be entitled to bring suit in the U.S. District Court against the Discharger for continuing violations of an effluent standard or limitation, permit condition or requirement, or Federal or State Order or Plan issued under the CWA in particular, but not limited to, CWA § 505(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board's Water Quality Control Plan or "Basin Plan," as exemplified by the incidents of non-compliance identified and outlined in this Notice.

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of National Pollutant Discharge Elimination System ("NPDES") permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), § 1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a).

The CWA requires that any Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement, River Watch notices the Discharger of the ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of NPDES Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ ("General Permit"), relating to marine facility services for the maintenance and repair of vessels.

The Discharger filed an Notice of Intent (NOI) agreeing to comply with the terms and conditions of the General Permit. The State Water Resources Control Board approved the NOI on or about May 7, 1999, and the Discharger was assigned Waste Discharger Identification ("WDID") number 2\_01I015112. River Watch contends that in the operation of the British Marine & Industrial facility, the Discharger has failed and is failing to comply with the terms and conditions of the General Permit requiring the preparation, implementation, review and update of an adequate Storm Water Pollution Prevention Plan ("SWPPP"), the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program.

Compliance with the monitoring and reporting program is central to the effectiveness of the General Permit program. River Watch contends the Discharger has failed and is failing to comply with the Annual Reporting requirements in the General Permit. The Discharger failed to obtain and report any water quality samples in reporting years 2008-2009, 2010-2011, 2011-2012, and sampled only 1 storm event in 2007-2008. Repeated statements in its



Annual Reports that due to the number of rain events, the timing of rain events, and/or evidence of insufficient discharge, there was no opportunity to collect the mandated 2 annual samples during each of the past 5 years, is contradicted by the evidence of reported sampling by other facilities in close proximity that are also covered under the General Permit and reported to the State and Regional Boards.<sup>1</sup>

The 2007-2008 Annual Report, the only Report submitted by the Discharger to the State Water Resources Control Board and Regional Water Quality Control Board that includes any sampling (for pH, Conductivity, and Total Suspended Solids only), demonstrates that the Discharger has failed and is failing to adequately sample for the full range of pollutants that have a reasonable potential of being present in discharges from the Oakland facility, including pollutants listed both in the California Toxics Rule ("CTR," 40 C.F.R. part 131) applicable specifically to regulated facilities identified by Standard Industrial Codes (SIC) 3731 and 3732 such as copper and zinc, as well as EPA Benchmarks. Compliance with the CTR and EPA Benchmarks would illustrate whether the Discharger implemented Best Management Practices ("BMPs") by the use of the Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT").

Finally, a review of Regional Water Quality Control Board files with respect to the British Marine & Industrial facility failed to reveal any Annual Report submitted for the reporting year 2009-2010.

2. *The activity alleged to constitute a violation.*

The Discharger's operations include bottom painting, engine and electrical work, haul outs, and "full service boat repairs" (<http://britishmarine-usa.com/>; January 23, 2013). The work, covered under SIC 3731 (Shipbuilding and Repairing) and 3732 (Ship and Boat Building and Repairing) is conducted both indoors and outdoors. The outdoor work is conducted on an asphalt paved yard with 1 identified storm drain. Both the storm drain and the navigable waters of the Brooklyn Basin are in close proximity to marine repair and maintenance activities at the site.

---

<sup>1</sup> Note that the report of storm events by the National Weather Service Forecast Office for "Downtown San Francisco F-6" ([http://www.wrh.noaa.gov/mtr/SFD\\_F6/sfd\\_f6.php](http://www.wrh.noaa.gov/mtr/SFD_F6/sfd_f6.php)) demonstrates that British Marine & Industrial had sufficient opportunity to have conducted the full compliment of 10 water quality samples for each of the 3 storm water discharge locations during the period 2007-2012.

Because the property on which British Marine & Industrial is located is subject to rain events, a range of pollutants including, but not limited to, used fluids, cleansers and degreasers, paint solids, heavy metals (e.g. zinc and copper), suspended solids, solvents, dust, oil and grease can discharge to the Brooklyn Basin and lower San Francisco Bay.

To properly regulate these activities and control the discharge of these types of pollutants, the State Water Resources Control Board requires industrial facilities to obtain and comply with the terms and conditions of an individual NPDES permit or seek coverage under the General Permit (or obtain exemption under the terms of the General Permit from its requirements). Review of the public record by River Watch reveals that the Discharger obtained coverage under the General Permit, but fails to comply with its environmentally protective requirements, in particular, compliance with the critically important sampling and comprehensive annual reporting requirement.

River Watch, in addition to alleging illegal storm water discharges, alleges the Discharger to be discharging non-storm water from its facility that is not authorized under the General Permit, in violation of CWA § 301(a). These discharges, which require a separate individual NPDES permit, include the power-washing of equipment and vessels, and painting and repair activities that allow the discharge (via surface water and drift) of pollutants to waters of the United States

3. *The person or persons responsible for the alleged violation.*

The person or persons responsible for the alleged violations is British Marine & Industrial, referred to herein as the Discharger.

4. *The location of the alleged violation.*

The location or locations of the various violations is the permanent address of the facility at 9 Embarcadero Cove in Oakland, California, including the adjoining waters of the tidally influenced Brooklyn Basin and lower San Francisco Bay - all waters of the United States.

5. *The date or dates of violation or a reasonable range of dates during which the alleged activity occurred.*

The range of dates covered by this Notice is from January 22, 2008 to January 22, 2013. River Watch will from time to time update this Notice to include all violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.



6. *The full name, address, and telephone number of the person giving notice.*

The entity giving this notice is Northern California River Watch, 290 S. Main Street, #817, Sebastopol, CA 95472 – a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California. River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed as follows:

Law Offices of Jack Silver  
David Weinsoff, Esq.  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Tel. 707 528-8175  
Fax. 707-528-8675  
Email: [lhm28843@sbcglobal.net](mailto:lhm28843@sbcglobal.net).

#### **STATUTORY BACKGROUND**

CWA § 301(a), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into waters of the United States, unless such discharge is in compliance with various enumerated sections of the Act. Among other things, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual NPDES permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. §1342. CWA § 402(p), 33 U.S.C. §1342(p), establishes a framework for regulating storm water discharges under the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. EPA has authorized California's State Water Resources Control Board to issue NPDES permits including general NPDES permits in California.

The State Water Resources Control Board elected to issue a statewide general permit for industrial discharges, and issued the General Permit on or about November 19, 1991, modified the General Permit on or about September 17, 1992, and reissued the General Permit on or about April 17, 1997, pursuant to CWA § 402(p).

In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and complied with its terms.

The General Permit contains certain absolute prohibitions. Discharge Prohibition A(1) of the General Permit prohibits the direct or indirect discharge of materials other than storm water ("non-storm water discharges"), which are not otherwise regulated by a NPDES permit, to the waters of the United States. Discharge Prohibition A(2) prohibits storm water discharges and authorized non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. Receiving Water Limitation C(1) of the General Permit prohibits storm water discharges to any surface or ground water that adversely impact human health or the environment. Receiving Water Limitation C(2) prohibits storm water discharges that cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board Basin Plan.

In addition to absolute prohibitions, the General Permit contains a variety of substantive and procedural requirements that dischargers must meet. Facilities discharging, or having the potential to discharge, storm water associated with industrial activity that have not obtained an individual NPDES permit must apply for coverage under the General Permit by filing a NOI. The General Permit requires existing dischargers to file NOIs before March 30, 1992.

Dischargers must also develop and implement a SWPPP which must comply with the standards of BAT and BCT. The SWPPP must, among other requirements:

- Identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm and non-storm water discharges from a facility, and identify and implement site-specific BMPs to reduce or prevent pollutants associated with industrial activities in storm water and authorized non-storm water discharges [Section A(2)]. BMPs must implement BAT and BCT [Section B(3)].
- Include: a description of individuals and their responsibilities for developing and implementing the SWPPP [Section A(3)]; a site map showing the facility boundaries, storm water drainage areas with flow pattern and nearby water bodies, the location of the storm water collection, conveyance and discharge system, structural control measures, impervious areas, areas of actual and potential pollutant contact, and areas of industrial activity [Section A(4)]; a list of significant materials handled and stored at the site [Section A(5)]; and, a description of potential pollutant sources including industrial processes,



material handling and storage areas, dust and particulate generating activities, and a description of significant spills and leaks, a list of all non-storm water discharges and their sources, and a description of locations where soil erosion may occur [Section A(6)].

- Include an assessment of potential pollutant sources at the facility and a description of the BMPs to be implemented at the facility that will reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges, including structural BMPs where non-structural BMPs are not effective [Section A(7), (8)].
- Be periodically evaluated to ensure effectiveness and be revised where necessary [Section A(9),(10)].

The General Permit requires dischargers to eliminate all non-storm water discharges to storm water conveyance systems other than those specifically set forth in Special Condition D(1)(a) of the General Permit and meeting each of the conditions set forth in Special Condition D(1)(b).

As part of the monitoring program, industrial dischargers must identify all storm water discharge locations that produce a significant storm water discharge, evaluate the effectiveness of BMPs in reducing pollutant loading, and evaluate whether pollution control measures set out in the SWPPP are adequate and properly implemented. Dischargers must conduct visual observations of these discharge locations for at least 1 storm per month during the wet season (October through May) and record their findings in the Annual Report. Dischargers must also collect and analyze storm water samples from at least 2 storms per year in compliance with the criteria set forth in Section B(5). Dischargers must also conduct dry season visual observations to identify sources of non-storm water pollution in compliance with Section B(7).

Section B(14) of the General Permit requires dischargers to submit an "Annual Report" by July 1 of each year to the executive officer of the relevant Regional Water Quality Control Board. Section A(9)(d) of the General Permit requires the discharger to include in the annual report an evaluation of the discharger's storm water controls, including certifying compliance with the General Permit. *See also* Sections C(9), C(10) and B(14).

The EPA has established Parameter Benchmark Values as guidelines for determining whether a facility discharging storm water has implemented the requisite BAT and BCT. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000). CTR limitations are also applicable to all non storm water and storm water discharges. (40 C.F.R. part 131).

The Regional Water Quality Control Board has established water quality standards for the San Francisco Basin. This Basin Plan includes a narrative toxicity standard and a narrative oil and grease standard. The Basin Plan provides that "[w]aters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses." The Basin Plan establishes limits on metals, solvents, pesticides and other hydrocarbons.

## **VIOLATIONS**

River Watch contends that between January 22, 2008 and January 22, 2013 the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by discharging pollutants to waters of the United States from the Embarcadero Cove facility in Oakland without an individual NPDES permit, or in violation of the General Permit. The violations discussed herein are derived from eye witness reports and records publically available, or records in the possession and control of the Discharger. Furthermore, River Watch contends these violations are continuing.

As discussed above, the Discharger has failed and is failing to regularly complete and report to the State Water Resources Control Board 2 annual sampling and analysis results. In addition, the Discharger, in the annual sampling and analysis that it has conducted, has failed and is failing to fully sample for the full range of pollutants commonly found in discharges from boat building and repair facilities including, but not limited to, zinc and copper.

Once the Discharger fully complies with the sampling and annual reporting requirements, River Watch believes the discharges will confirm that the Embarcadero Cove marine repair facility site is neither properly bermed nor operated to ensure that storm and non-storm water discharges are properly contained, controlled, and/or monitored.

## **REMEDIAL MEASURES REQUESTED**

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts of the Discharger's non-compliance upon public health and the environment surrounding the British Marine & Industrial facility:

1. Prohibition of the discharges of pollutants including, but not limited to, paint, oil and grease, fuel, solvents, solid waste, chemical waste, biological material, garbage, dirt, dust, and metals (including copper and zinc) from the vessel repair and maintenance activities.



2. Compliance with the terms and conditions of the General Permit, and BMPs detailed in the EPA's Industrial Stormwater Fact Sheet Series, Sector R: Ship and Boat Building or Repair Yards" (EPA Office of Water, EPA-833-F-06-033, December 2006;(www.epa.gov/npdes/pubs/sector\_r\_shipbuilding.pdf.).
3. Compliance with the storm water sampling, monitoring and reporting requirements of the General Permit.
4. Sampling of storm water at least 4 times per year over each of the next 5 years: at "first flush"; the first significant rain after "first flush"; the first significant rain after April 1; and the second significant rain after April 1.
5. 100% of the discharge from the Discharger's site and facility must be discharged through discrete conveyances.
6. Any discharge from the Discharger's site and facility to a water of the United States must be sampled during the 4 sampling events identified in paragraph #4 above.
7. Preparation and submittal to the Regional Water Quality Control Board of a "Reasonable Potential Analysis" for the Discharger's site and its operations.
8. Preparation of an updated SWPPP including a monitoring program, with a copy provided to River Watch.

## CONCLUSION

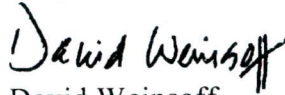
Violators of the Clean Water Act are subject to an assessment of civil penalties of up to \$32,500 per day/per violation for all violations occurring through January 12, 2009, and \$37,500 per day/per violation for all violations occurring after January 12, 2009, pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4.

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch use the affected watershed for recreation, sports, fishing, swimming, hiking, photography, nature walks and the like. Their health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as set forth in this Notice.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch has cause to file a citizen's suit under CWA § 505(a) against the Discharger for the violations of the CWA

described in this Notice. During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations identified in this Notice. However, if the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,



David Weinsoff

DW:lhbm

Attachment A - Map

cc: Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N. W.  
Washington, D.C. 20460

✓ Regional Administrator  
✓ U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812

Executive Officer  
Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street / Suite 1400  
Oakland, CA 94612